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Good morning, Mr. Chairman and members of the Committee. We welcome the opportunity to present joint testimony on the national implications of the recent Department of the Army (Army) and U.S. Environmental Protection Agency (EPA) Clean Water Act (CWA) rulemaking defining the terms "fill material" and "discharge of fill material" for the Section 404 program.

In today's testimony, we will explain the rule, its history, and how it will result in more effective regulation of activities under the CWA, leading to a reduction in environmental impacts. We also will address the ramifications of the May 8, 2002, decision in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh* [No. 2:01-770 (S.D.W.Va.)] for the rule and how the agencies intend to proceed. Army and EPA are committed to protecting this nation's aquatic resources consistent with the requirements of the CWA and the final fill rule enhances our ability to do just that.

BACKGROUND

Before discussing the specifics of the rulemaking, let us first explain the underlying context. The definition of "fill material" has a long history that reflects the complexity associated with the purposes of the CWA. The CWA reflects a national commitment to protect the nation's aquatic resources, but it establishes that commitment in a context that also recognizes that our waters are used for a variety of purposes. The CWA establishes permitting programs that are designed to strike the appropriate balance between those competing purposes. The definition of "fill material" is indicative of the challenge that exists in ensuring that all of the goals of the CWA are met.

The CWA governs the “discharge” of “pollutants” into “navigable waters,” which are defined as “waters of the United States.” Specifically, Section 301 of the CWA generally prohibits the discharge of pollutants into waters of the U.S., except where such discharges are authorized under either CWA Section 404, which regulates the discharge of dredged or fill material, or CWA Section 402, which regulates all other pollutants under the National Pollutant Discharge Elimination System (NPDES) program.

These two permit programs are designed to address different types of materials. In keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, Sections 404 and 402 employ different approaches to regulating the discharges to which they apply. The Section 402 program is focused on (although not limited to) discharges such as wastewater discharges from industrial operations and sewage treatment plants, stormwater and the like. Pollutant discharges are controlled under the Section 402 program principally through the imposition of effluent limitations, which are restrictions on the “quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters” [CWA Section 502(11)]. Section 402 permits must include effluent limitations that reflect treatment with available pollution control technology, and any more stringent limitations necessary to meet water quality standards for the receiving water [CWA Section 301(b)]. There are no statutory or regulatory provisions under the Section 402 program designed to address discharges that convert waters of the U.S. to dry land. Moreover, the Section 402 permitting process does not require an evaluation of alternatives to a proposed discharge or mitigation for unavoidable impacts.

In contrast, the Section 404 permitting program does specifically contemplate the possible conversion of waters to non-waters and is designed, therefore, to evaluate and provide for ways to avoid, minimize, and compensate for the impacts of such conversions. Just because material is characterized as "fill material" does not mean that a Section 404 permit will necessarily authorize a particular discharge -- the permit process carefully screens proposed discharges and applies the 404(b)(1) Guidelines, which provide a comprehensive means of evaluating whether any discharge of fill, regardless of its purpose, is environmentally acceptable. First, a discharge is categorically prohibited if it would significantly degrade a water of the United States. In addition, no discharge may be allowed if there is a less environmentally damaging practicable alternative to placing the material in waters of the United States. Finally, where there is no other alternative, the discharge may be allowed if the permit applicant has taken all practicable steps to minimize the amount of material discharged, and compensate for the remaining, unavoidable impacts through mitigation.

This comprehensive environmental evaluation is specifically suited to addressing activities whose effect is to convert waters to dry land, because it ensures the associated habitat modification is avoided, minimized and compensated for to the maximum extent practicable. The sufficiency of this permitting process to provide appropriate environmental protection for waters of the U.S. does not depend on the purpose of the discharge of fill material. The Section 404(b)(1) Guidelines also provide for

consideration of the effects of chemical contaminants on water quality in a number of ways, specifically requiring compliance with applicable State water quality standards [40 CFR 230.10(b)(1)], toxic effluent limits or standards established under CWA Section 307 [40 CFR 230.10(b)(2)], and appropriate use of chemical and biological testing to evaluate contaminant effects [40 CFR 230.11(d) and (e); 230.60]. However, because Section 404 was intended by Congress to provide a vehicle for regulating materials whose effects include the physical conversion of waters to non-waters or other physical alterations of aquatic habitat, the Section 404(b)(1) Guidelines go beyond such a water quality based approach to require careful consideration of the effects of the discharge on the aquatic ecosystem as a whole, as well as evaluation of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects. Although Section 404 provides for the regulation of discharges of fill material, Congress did not define "fill material" in the Act, leaving it to the agencies to define the term consistent with the overall goals of the Act. Prior to 1977, the Corps and EPA had the same "fill material" definition. We both defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose. . . ." [40 FR 31325 (July 25, 1975); 40 FR 41291 (September 5, 1975)].

In 1977, the Corps amended its definition of "fill material" to add a "primary purpose test," which focused on whether the primary purpose of the material was to raise the bottom elevation of a water or convert wet to dry land. The definition also specifically excluded material that was discharged primarily to dispose of waste [42 FR 37130 (July 19, 1977)]. This change was adopted by the Corps because it recognized that some discharges of solid waste materials technically fit the definition of fill material; however, the Corps believed that such waste materials should not be subject to regulation under the CWA Section 404 program.[1] For example, the Corps sought to exclude the disposal of trash and garbage from regulation under section 404.

However, the definition of "fill material" is not just significant to the Section 404 program. Because Section 402 is applicable to all pollutants other than dredged or fill material, the definition of what does or does not constitute "fill material" impacts on the 402 program as well. Rather than change its regulations to adopt a "primary purpose test" similar to that adopted by the Corps, the EPA regulations retained a focus on the effect of the material (an "effects-based test") in determining whether a discharge would be subject to Section 404 or Section 402. The EPA regulations provided that any material that has the effect of raising the bottom elevation of a water body or converting

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[1] The Corps' definition of "fill material" adopted in 1977 reads as follows:

> (e) The term "fill material" means any material used *for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, *as that activity is regulated under section 402 of the Clean Water Act*." 33 CFR 323.2(e) (2001)(emphasis added).

wet to dry land is "fill material."[2] EPA retained the effects-based approach because it avoids the need to ascertain the "purpose" of a project in order to determine regulatory requirements, and ensures that discharges with similar environmental effects receive similar regulatory treatment.

Over time, the agencies began to see evidence that their differing definitions created uncertainty among both regulators and members of the regulated public. In 1986, the agencies entered into a Memorandum of Agreement (1986 MOA)[3] in an effort to clarify when Section 402 versus Section 404 was the appropriate framework. Nevertheless, there continued to be regulatory uncertainty.

In addition, the purpose test lends itself to the possible exclusion of materials from Section 404 that are most commonly used for the very purpose of raising the elevation of an area (i.e., of filling a water of the U.S.) if the materials are a waste product of some other activity, and thus can lead to incongruous results. For example, some might argue that test would preclude the Corps from allowing the excess rock and dirt that is generated on road construction projects in steep slope areas to be used as "fill material" because it is a waste by-product of that activity. Nevertheless, the very same material that is discharged under different circumstances would be generally regulated as fill material.

The uncertainty caused by differing definitions, in general, and the "primary purpose test," in particular, has also engendered litigation. We are concerned that if inconsistencies and ambiguities in the regulatory definitions of "fill material" are not corrected, further litigation will arise and future court decisions could reduce the ability of the CWA Section 404 program to protect the quality of the aquatic environment, and the overall public interest.

The court decision that most clearly illustrates the serious problems caused by the "primary purpose test" is the Ninth Circuit Court of Appeals decision in *Resource Investments Incorporated v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998) (the *RII* case). This case involved a CWA Section 404 permit application for a solid waste landfill proposed to be built in waters of the U.S. located in the State of Washington. The Corps' Seattle District Engineer denied the Section 404 permit, on the grounds that a solid waste landfill at that location could contaminate an important "sole source" aquifer, and on the basis that environmentally safer, practicable alternatives were

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[2] 40 CFR 232.2 defines "fill material" as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body *for any purpose"* (emphasis added).

[3] Memorandum of Agreement Between the Assistant Administrators for External Affairs and Water, U.S. Environmental Protection Agency, and the Assistant Secretary of the Army for Civil Works, Concerning Regulation of Discharges of Solid Waste Under the Clean Water Act.

available to handle the region's solid waste. When the permit applicant sued, the District Court upheld the Corps' permit denial, but the Ninth Circuit Court of Appeals reversed.

One of the Ninth Circuit's conclusions in the *RII* decision was that the "primary purpose" test in the Corps' definition of the term "fill material" meant that the Corps could not require a CWA Section 404 permit for pollutants that the applicant proposed to discharge into waters of the U.S. for construction of a proposed landfill. Based on the Corps' definition of fill material, the Ninth Circuit determined that the layers of gravel, low permeability soil, and synthetic liner that would underlie the solid waste landfill did not constitute "fill material." The Court reasoned that the "primary purpose" of these materials (e.g., soil and gravel) to be placed in the waters of the U.S. was not to change the bottom elevation of a water body or replace an aquatic area with dry land, but to create a leak detection and collection system.

The Ninth Circuit's decision in the *RII* case illustrates the inherent problems in the "primary purpose" test. In *RII*, the litigant was successful in excluding from regulation under the CWA Section 404 program traditional fill material, by alleging an alternative primary purpose. Typically fill serves some purpose other than just creating dry land or changing a water body's bottom elevation. Thus, if this approach to interpreting the Corps' "primary purpose test" were to be taken to its extreme conclusion, the unreasonable end result could be that almost any traditional fill material proposed to be placed in waters of the U.S. does not need a Section 404 permit. Such an interpretation would be clearly contrary to the intent of Congress expressed in the plain words of CWA Sections 404 and 301, which require that any "fill material" to be placed in any water of the U.S. must be legally authorized by a permit under CWA Section 404.

Similarly, *Bragg v. Robertson*, 54 F. Supp. 2d 563 (S.D. W. VA. 1999) (and now the *Rivenburgh* case) are further evidence of how the uncertainty in the regulatory context resulted in a misinterpretation of the legal framework governing this program. In *Bragg*, despite its previous approval of a settlement agreement recognizing use of Section 404 to regulate overburden, the District Court, in a decision addressing claims under State law, stated in *dicta* that under the then-existing Corps regulations Section 404 was <u>not</u> the appropriate framework for regulating overburden because it was waste material. Although that decision was ultimately vacated by the Fourth Circuit Court of Appeals on jurisdictional grounds, the same court in its May 8, 2002, decision in the *Rivenburgh* case went even further and concluded that the CWA itself did not contemplate regulation of waste discharges under Section 404. We will further discuss the *Rivenburgh* decision later in our testimony, but decisions such as these underscore why a clear statement of regulatory policy, which the agencies have attempted to do in our recent rule, is essential.

For some time, there has been strong public concern surrounding the fill rule and related issues. In the past, both industry and environmental groups have urged the agencies to reconcile their differing definitions of "fill material." Industry was frustrated by the confusion and additional time that was sometimes necessary to process applications as the agencies sorted out their different regulatory perspectives. At one time, environmental groups believed that EPA's effects-based approach to the definition

of fill material was more environmentally protective and went so far as bring suit in 1982 to have the Corps definition declared unlawful and invalid and to enjoin its implementation.

APRIL 2000 PROPOSAL

For the reasons just characterized, the Clinton Administration, on April 20, 2000, proposed a joint rule to revise the Army and EPA regulations defining the term “fill material.” Consistent with the terms of the settlement agreement entered in the *Bragg* litigation between the federal defendants and the plaintiffs, the proposal made clear that discharges into waters of the U.S. of coal mining overburden, and berms, dams, or roads associated with the sedimentation ponds would continue to be regulated as "fill material." In developing the regulatory revisions, the Army and EPA sought to improve regulatory clarity in a manner that is generally consistent with EPA's long-standing definition and current practice. The goal was to maintain or improve existing environmental protections in a manner that would avoid major disruptions or reallocations of responsibilities between the ongoing Section 404 and 402 programs and to ensure that no new types of pollutant discharges would now become allowable. The approach adopted by the proposal, and ultimately the final rule, best protects the environment, minimizes potential program disruptions, and properly reflects the differing regulatory approaches established by Sections 402 and 404 of the CWA.

The proposal was to amend both the Army and EPA definitions of "fill material" to provide a single definition of that term. The proposal, which was consistent with EPA's long-standing definition and the current practice of the agencies, would result in material that has the effect of filling waters of the U.S. being deemed "fill material" and thus subject to evaluation under the CWA Section 404(b)(1) Guidelines, which were specifically written to address material with that type of effect. At the same time, the proposal would have specifically excluded from the definition of "fill material" discharges subject to EPA proposed or promulgated effluent limitation guidelines and standards under CWA Sections 301, 304, and 306, or covered by a NPDES permit issued under CWA Section 402. The proposed revisions also contained a change to the definition of the term “discharge of fill material,” in order to provide further clarification that landfill construction and placement of coal mining overburden are regulated under Section 404. In addition, the preamble to the proposal sought comment on whether to amend the Corps' regulations so as to provide a definition of "unsuitable fill material" that could not receive a Section 404 permit, and set out a potential definition for that term.

The proposal originally was issued with a 60-day public comment period. However, in response to requests from the public, the agencies extended the comment period for an additional 30 days, providing a total comment period of 90 days, which closed on July 19, 2000. We received over 17,200 comments on the proposed rule, most of which consisted of identical or substantially identical e-mails, letters, and postcards opposing the rule and generated from websites that enabled the sender to submit an e-mail or fax by simply typing in their name and clicking a button. Approximately 500 of

the comments consisted of more individualized letters, with a mixture of those comments supporting and opposing the rule.

The comments of environmental groups and the various form letters were strongly opposed to the proposal, in particular, the elimination of the waste exclusion and the discussion in the preamble regarding treatment of unsuitable fill material. Except for several representatives of landfill interests, comments from the regulated community generally supported the proposal, in particular, the fact that the rule would create uniform definitions of "fill material" for the Corps' and EPA's rules and maintain regulation of certain discharges under Section 404 as opposed to Section 402 of the CWA.

MAY, 2002 FINAL RULE

The comments on the April 2000 proposal addressed a number of issues briefly discussed below, including adoption of a single consistent EPA and Corps definition of "fill material," the use of an effects-based test for defining "fill material,"and the elimination of the waste exclusion from the Corps' definition. This latter issue was a matter of particular concern to the environmental community.

With regard to adoption of a single EPA and Corps definition, the majority of the comments from both the environmental and industry perspectives expressed the general view that the agencies should have the same definitions for the key jurisdictional terms "fill material" and "discharge of fill material." Many such comments also noted that the differences between the Corps' and EPA's rules have historically caused confusion for the regulated community. The final rule, like the proposal, provides for a consistent Corps and EPA definition of these key terms.

Most of the comments that addressed use of an effects-based test for defining "fill material" expressed support for its use, as well as for elimination of the "primary purpose" test from the Corps' definition. However, there were some commenter who disagreed with such an approach. They gave a variety of reasons for their opposition, believing elimination of the primary purpose test from the Corps' definition was unnecessary, that purpose-based tests were successfully used in other statutes and elsewhere in the Section 404(b)(1) Guidelines, that alternative ways of resolving the issue without a rule change were available, and that the proposal represented an expansion of Section 404 jurisdiction.

We carefully considered such comments, but concluded that the objective standard created by an effects-based test will yield more consistent results in determining what is "fill material" and will provide greater certainty in the implementation of the program. An objective, effects-based standard also helps ensure that discharges with similar environmental effects will be treated in a similar manner under the regulatory program. As previously discussed, the subjective, purpose-based standard led in some cases to inconsistent treatment of similar discharges, a result which hampers effective implementation of the CWA. In addition, despite previous efforts to resolve the uncertainties resulting from the differing Corps and EPA definitions without rulemaking

(e.g., the 1986 MOA), regulatory uncertainties continued to arise. Thus, the final rule, like the proposal, uses an effects-based approach to provide a single definition of the term "fill material."

In particular, the final rule defines “fill material” as material placed in waters of the U.S. where the material has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of water. This approach is similar to EPA's long-standing definition of the term "fill material." For purposes of increased clarity, the final rule also contains specific examples of “fill material” including rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters of the U.S.

With regard to elimination of the waste exclusion from the Corps’ definition, comments from the environmental community and general public strongly opposed its elimination. Some of these comments recommended that the agencies include in the regulation a general exclusion from the definition of “fill material” for any discharge of “waste.” Some commenter expressed the view that deletion of the waste exclusion language from the Corps’ regulations violates the CWA, and pointed to the decisions in *RII* and *Bragg* to support that view. Many of these comments acknowledged, however, that when waste is discharged for a purpose other than mere disposal, (e.g., to create fast land for development), review under the Section 404 permit process in accordance with the Section 404(b)(1) Guidelines adequately protects the environment and is consistent with the CWA.

We believe that a categorical exclusion for waste would be over-broad, and the final rule thus does not contain such an exclusion. Simply because a material is disposed of for purposes of waste disposal does not, in our view, justify excluding it categorically from the definition of "fill material." Some waste (e.g., mine overburden) consists of material such as soil, rock and earth, that is similar in its characteristics and effects to “traditional” fill material used for purposes of creating fast land for development. In addition, other kinds of waste having the effect of fill (e.g., certain other mining wastes, concrete, rubble) also can be indistinguishable either upon discharge or over time from structures created for purposes of creating fast land. Given the similarities of some discharges of waste to “traditional” fill, we declined to categorically exclude all wastes from the definition, allowing the appropriateness of the material to be assessed in the permit review process. The final rule, however, was modified in light of the comments to specifically exclude trash or garbage.

The proposed rule's preamble addressed a related issue of whether to define "unsuitable fill material," and contained an example definition of that term. The comments on that proposal expressed almost unanimous opposition to this "unsuitable fill material concept," in some cases viewing it as too limited and an inadequate substitute for the elimination of the waste exclusion, in others' opinion, leaving too much discretion as to what is “unsuitable fill material,” and impermissibly rejecting materials out of hand that might be acceptable when actually evaluated under the permitting process.

However, many of the comments received did assert that various types of trash or garbage are not appropriate to use, as a general matter, for fill material in waters of the U.S. We believe these impacts can be generally avoided because there are alternative clean and safe forms of fill material that can be used to accomplish project objectives and because there are widely available landfills and other approved facilities for disposal of trash or garbage. In light of this, the final rule was modified to add an exclusion of trash and garbage from the definition of "fill material."

In addition to the foregoing issues, the final rule itself, unlike the proposal, does not contain an exclusion from "fill material" for discharges covered by effluent limitation guidelines or standards or NPDES permits. This change was made in light of comments expressing concern that the proposed rule language regarding the exclusion was susceptible to differing interpretations and would result in uncertainty with respect to the regulation of certain discharges. However, while the language in question does not appear in the final rule itself, the preamble does emphasize that the effects-based definition is consistent with EPA's long-standing approach to defining fill material, and generally is intended to maintain our existing approach to regulating pollutants under either Section 402 or 404 of the CWA. In particular, as noted in the preamble, the final rule does not change any determination EPA has made regarding discharges that are subject to effluent limitation guidelines and standards, which will continue to be regulated under Section 402 of the CWA. In addition, the preamble notes the final rule does not alter the manner in which water quality standards currently apply under the Section 402 or the Section 404 programs.

With regard to solid waste landfills and the *RII* case, comments from the regulated community asserted that the regulation under Section 404 of discharges for creation of infrastructure associated with solid waste landfills (e.g., roads, liners, berms, dikes) was inconsistent with the court's decision in *RII*. However, as explained in considerable detail in the preamble to the final rule, we do not agree, and instead believe that an effects-based test is the appropriate means of evaluating whether a pollutant is "fill material." Like the proposal, the final rule thus makes clear that discharges having the effect of raising the bottom elevation of a water or replacing water with dry land, including fill used to create landfills such as liners, berms and other infrastructure associated with solid waste landfills are discharges of fill material subject to the Section 404 program. These types of discharges have been consistently subject to regulation under Section 404, and the final rule clarifies that the important environmental protections of the Section 404 program continue to apply to such discharges.

RELATIONSHIP OF RULEMAKING AND MOUNTAINTOP MINING

We recognize that this rulemaking has been the subject of considerable public attention and controversy, largely because opponents of the practice of mountaintop mining have viewed this issue as an opportunity to halt that practice. Notably, neither this rule nor the CWA are the principal vehicle provided by Congress for regulating

mountaintop mining activities. Rather, the responsibility was delegated to the Secretary of the Interior, through the Office of Surface Mining, under the Surface Mining Control and Reclamation Act (SMCRA). Nevertheless, this rulemaking has been incorrectly painted as being designed to facilitate the continuation of mountaintop mining. In actuality, it was undertaken in light of years of past experience in order to enhance regulatory clarity and improve environmental protection. However, because this rulemaking has been depicted as linked to promotion of mountaintop mining, we would like to take this opportunity to briefly discuss the Administration's efforts to provide for more effective and environmentally sound management of that practice under the existing regulatory framework.

Consistent with the Bragg settlement agreement, we are continuing to develop a programmatic Environmental Impact Statement (EIS) that will consider appropriate changes to agency policies, guidance, and coordinated agency decision-making processes to reduce the adverse environmental effects to waters of the U.S. and to fish and wildlife resources from mountaintop mining operations, and to other environmental resources that could be affected by the size and location of fill material in valley fill sites. This is an inter-agency activity being undertaken by EPA, the Corps, the Office of Surface Mining (OSM), and the U.S. Fish and Wildlife Service (FWS), in cooperation with the State of West Virginia.

In addition, on January 15, 2002, the Corps modified Nationwide Permit 21 (NWP 21), which is the CWA Section 404 general permit most often used to authorize discharges of dredged or fill material associated with surface mining activities. Under the revised NWP, the District Engineer will make a specific determination on a case-by-case basis that the proposed activity complies with the terms and conditions of the NWP and that adverse effects to the aquatic environment are minimal both individually and cumulatively. Under revised NWP 21, the Corps also has clarified that it will require appropriate mitigation for impacts to aquatic resources.

In light of regional concerns about impacts in Appalachia from surface mining activities, Corps Headquarters has requested the relevant District Engineers to establish regional conditions in Appalachian States on the use of NWP 21 that are consistent with the provisions of the Federal District court approved settlement in the *Bragg* litigation in West Virginia, which generally limits use of NWP 21 for valley fills to watersheds draining 250 acres or less. As part of this, the Corps will make a project-specific evaluation of the cumulative loss of aquatic resources within the affected watershed. We believe these NWP changes, and continued development of the programmatic EIS, will further improve environmental protection with regard to surface mining activities in Appalachia.

In addition to the CWA-related activities described above, the Office of Surface Mining is responsible for developing the rules that govern mountaintop removal coal mining under the Surface Mining Control and Reclamation Act (SMCRA). Most Appalachian States administer these rules through programs delegated to them by OSM.

RIVENBURGH DECISION

The regulatory uncertainty associated with the differing Corps and EPA fill material definitions most recently has arisen again in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, in which plaintiff challenged a Corps' Section 404 authorization under the then-existing regulations for the discharge of overburden associated with a mountaintop mining coal operation. Following initiation of this lawsuit, the plaintiff moved for summary judgment on several grounds, including the claim that the Corps lacked authority under the then-existing Corps definition of fill material to authorize the placement of valley fill in waters of the U.S. for purposes of waste disposal. The government argued that the Corps' longstanding practice of regulating valley fills under Section 404 was consistent with the CWA, particularly in light of EPA's then-existing definition of fill material as any pollutant that replaces a water with dry land or raises the water's bottom elevation for any purpose. On May 6, the Government informed the court that the Corps and EPA had completed rulemaking reconciling the agencies' differing definitions which adopted an effects-based approach to defining the term.

On May 8, 2002, the court issued a decision finding that the Corps lacks the statutory authority to regulate any material discharged solely for purposes of waste disposal. While the new regulation was not challenged in this case, the court nonetheless stated that it was inconsistent with the CWA and exceeded the agencies' legal authority. The court decision enjoins the Corps from "issuing any further Sec. 404 permits that have no primary purpose or use but the disposal of waste."

We believe that the court misconstrued the CWA and its legislative history. EPA and the Corps explained in detail in the recent rulemaking the legal and policy basis for the agencies' revised definition of fill material, and we continue to believe that new definition is in full accord with the CWA. In light of this, USDOJ has requested a stay of the court's injunction because its economic and social impacts warrant such a stay pending appeal. In addition, we have argued we will likely prevail on the merits because (1) the Corps does have authority to issue permits under CWA 404 to allow for the discharge of mining overburden; (2) the court's approval of the Settlement Agreement in Bragg bars re-litigation of that issue; and (3) the Court's injunction is overly broad. We also have requested that the court clarify the scope of its injunction. In addition, intervenors, including the Kentucky Coal Association, have moved to stay the injunction. Plaintiffs oppose the stay and seek to expand the injunction. Briefing was completed on May 28 and we are monitoring a decision now.

CONCLUSION

This rulemaking is about the need to reconcile differing regulatory definitions so as to provide consistency and regulatory predictability. In order to achieve that goal, the definition adopted is fully consistent with EPA's existing definition and the Corps' longstanding practice, and further ensures that material with the effect of filling waters of the U.S. is regulated under the regulatory regime best designed to deal with those effects -- Section 404 of the CWA.

This concludes our testimony and we would be pleased to answer any questions you might have.

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